(1) Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SAMIR NAJJAR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the statute of limitations found in 18 U.S.C. § 3282, which provides that "no person shall be prosecuted, tried, or punished" after expiration of the limitations period, creates a jurisdictional bar that extinguishes the power of a court to try or punish or an affirmative defense subject to waiver, when the indictment or information shows on its face that the limitation period has expired?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to the petition and is published. *United States v. Najjar*, 283 F. 3d 1306 (11th Cir. 2002).

The opinion of the United States District Court denying the Motion to Dismiss appears at Appendix B to the petition and is unpublished.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on March 1, 2002. No petition for rehearing was filed.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(l).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

Art. III, § 1, provides:

> The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

18 U.S.C. § 3282 is also at issue in the case. That provision states:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

STATEMENT OF THE CASE

Samir S. Najjar, a physician, ("Najjar"), was the subject of a federal health care fraud investigation from 1995 until an Information was filed on August 10, 2000, charging him with one count of making a false statement to a department of the United States in December 1994, in violation of 18 U.S.C. 1001.[1]

On the same date the Information was filed, Najjar waived indictment by a grand jury, entered into a written plea agreement, and tendered a plea of guilty.

Prior to sentencing, Najjar moved to dismiss the Information for lack of jurisdiction based on the expiration of the

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[1] During the course of the investigation, Najjar executed five separate statute of limitations waivers.

statute of limitations as shown on the face of the Information. Najjar also moved to withdraw his guilty plea for a variety of reasons.

The District Court denied the motion to dismiss, holding that the statute of limitation was an affirmative defense that is waived upon entry of a guilty plea. The Court of Appeals affirmed the District Court's ruling.

The basis for federal jurisdiction in the District Court was founded on 18 U.S.C. § 3231. The Court of Appeals had jurisdiction over petitioner's appeal from the final judgment of the District Court under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

The inferior federal courts are courts of limited jurisdiction. They possess only that power "as the Congress may from time to time ordain and establish." Art. III, § 1. It is a "settled proposition" that the lower federal courts' judicial power is:

> dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.

Cary v. Curtis, 3 How. 236, 245, 11 L.Ed. 576 (1845). *See Ankenbrandt v. Richards*, 504 U.S. 689, 697-98, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992); *Argentine Republic v. Amerada Hess*, 488 U.S. 428, 433, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989). The power may not be expanded by judicial decree, *Kokkonen v. Guardian Life Insurance Co.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994), and, "once the lines are drawn, 'limits upon federal jurisdiction must be neither disregarded or evaded.'" *Keene Corp.*

v. United States, 508 U.S. 200, 207, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993) (quoting *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396, 57 L.Ed. 2d 274 (1978)). This principle is equally applicable to "criminal cases arising under the laws of the United States." *Palmore v. United States*, 411 U.S. 389, 401, 93 S.Ct. 1670, 36 L.Ed.2d 342 (1973). The jurisdiction of the lower federal courts—their power to adjudicate—is beyond the scope of litigants to confer by agreement or waiver. *See United States v. Cotton*, 2002 U.S. Lexis 3565 at *11 (May 20, 2002) (No. 01-687) Because subject matter jurisdiction "involves a court's power to hear a case [it] can never be forfeited or waived." *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 702, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982); *NAACP v. New York*, 413 U.S. 345, 353, 93 S.Ct. 2591, 37 L.Ed.2d 648 (1973).

It is against this backdrop that Najjar contends 18 U.S.C. § 3282 is a jurisdictional bar because it limits the judicial power of a court to try or punish for an offense instituted after the expiration of the limitations period set forth therein.

A. Plain Statutory Language

The language of the statute is both the starting point and, Najjar argues, the end point. Section 3282 provides:

> *Except as otherwise expressly provided by law*, no person shall be prosecuted, *tried, or punished* for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C.A. § 3282 (West 2001) (emphasis added). The emphasized language establishes the jurisdictional nature of the statute, in that Congress has unambiguously extinguished the power of a court to try or punish beyond the limitations period "[e]xcept as otherwise expressly provided by law." *Id.* Under the normal rules of statutory construction, the plain language of the statute must be given its proper effect.

United States v. Ron Pair Enterprises, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989). If the language of a statute is plain, the interpretative function ceases and the statute enforced according to its terms. *Id.* Congress granted the lower federal courts jurisdiction over all offenses against the United States in 18 U.S.C. § 3231, but as it is its sole prerogative to do, limited the jurisdiction to try or punish for any offense instituted beyond the limitations period in § 3282.

In its only case construing the pertinent language of § 3282, this Court determined several general principles which are applicable here. First, "criminal limitations statutes are 'to be liberally interpreted in favor of repose.' *United States v. Scharton*, 285 U.S. 518, 522, 52 S.Ct. 416, 76 L.Ed 917 (1932)." *Toussie v. United States*, 397 U.S. 112, 115, 990 S.Ct. 858, 25 L.Ed.2d 156 (1970). Second, the *Toussie* Court emphasized the precise language which Najjar contends is controlling, stating that "Congress has declared a policy that the statue of limitations should not be extended 'except as otherwise expressly provided by law.'" 397 U.S. at 115 (quoting 18 U.S.C. § 3282). In this vein, the Court held that any exceptions mush be narrowly construed and "should not be reached unless the explicit language of the substantive criminal statute compels such a determination. . . ." *Id.* Applying these principles, the Court concluded that the offense of failing to register for the draft was not a continuing one despite the existence of administrative regulations which implied otherwise. Relying on the explicit command by Congress that the limitations period was absolute "except as otherwise expressly provided by law," the Court held that neither the administrative regulations nor the statute which criminalized failure to register for the draft requires that the offense be treated as the type of offense that extends the statute of limitations. *Id.* at 121 & n.17. The Court stated that:

> [W]hen a court concludes that the statute does bar a given prosecution, it must give effect to the clear

> expression of congressional well that in such a case 'no person shall be prosecuted, tried, or punished.'

Id. at 124. *Cf. Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143, 157, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987) (Scalia, J., concurring in the judgment) (§ 3282 "operates to *forbid* prosecution, trial, or punishment 'unless the indictment is found or the information is instituted within five years next after such offense shall have been'") (Emphasis added) (quoting § 3282).[2]

That Congress has seen fit to "expressly" set forth a number of exceptions to § 3282, none of which are applicable here, clearly demonstrates that it intended to preclude any exceptions under other, unstated circumstances. *Cf. United States v. Brockamp*, 519 U.S. 347, 352, 117 S.Ct. 849, 136 L.Ed.2d 818 (1997) (because 26 U.S.C. § 6511 sets forth explicit exceptions to its basic time limits "Congress did not intended courts to read other unmentioned, open ended, 'equitable' exceptions into the statute it wrote."); *Crosby v. United States*, 506 U.S. 255, 259, 113 S.Ct. 748, 122 L.Ed.2d 25 (1993) (Fed.R.Crim.P. 43 was qualified by the "express use of a limiting phrase" which stated "except as otherwise provided" trial may not proceed without the defendant. "In that respect the language and structure of the Rule could not be more clear.") For example, 18 U.S.C. §§ 3282-3295 expressly extend or toll the limitations period under several scenarios including, but not limited to, fugitives from justice, certain terrorism offenses, and wartime conditions. Congress even allowed for the United States, upon application indicating that evidence of an offense is in a foreign country,

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[2] Consistent with Najjar's argument that § 3282 creates a jurisdictional bar to trial or punishment after expiration of the limitation period, this Court held in *United States v. Marion*, 404 U.S. 307, 322, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), that the applicable criminal statute of limitations provides "predictability by specifying a limit beyond which there is an irrebuttable *presumption* that a defendant's right to a fair trail would be prejudiced." (Emphasis added).

to toll the limitations period for up to three years. *See* § 3292. The use of unambiguous, emphatic language ("[e]xcept as otherwise expressly provided by law"), and the subsequent listing of specific exceptions, compels the determination that Congress intended no additional exceptions to its command that no person shall be "prosecuted, tried, or punished" beyond the limitations period.[3]

Faced with a similar situation in *United States v. Dalm,* 494 U.S. 596, 110 S.Ct. 1361, 108 L.Ed.2d 548 (1990), a tax refund case, the Court was persuaded that congress had "legislated exceptions to the limitations period prescribed by [the Internal Revenue Code]." 494 U.S. at 610. Those statutes, like § 3282 *et seq.*, specify the circumstances under which a taxpayer may obtain a refund after expiration of the limitations period. Like the instant case, it ws undisputed that Dam's action did not come within any of the exceptions. *Id.* The Court stated: "were we to allow [Dalm] to maintain a suit for refund on the basis of equitable recoupment, we would be

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[3] In *Soriano v. United States,* 352 U.S. 270, 77 S.Ct. 269, 1 L.Ed.2d 306 (1957), the Court determined that a statute of limitations gave jurisdiction over claims against the United States for a specific period of time, and that the courts were powerless to add any exceptions other than those enumerated by Congress. 352 U.S. at 273-275. The Court stated: "Congress was entitled to assume that the limitation period it prescribed meant just that period and no more. With this intent in mind, Congress has passed specific legislation each time it has seen fit to toll such Statutes of limitations because of war. And this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly construed and exceptions thereto are not to be implied." *Id.* at 276. *Accord Toussie*, 297 U.S. at 115 (liberally construing § 3282 in favor of repose and not recognizing any exceptions "unless the explicit language of the substantive criminal statute compels such a conclusion.").

doing little more than overriding Congress judgment as to when equity requires that there be an exception to the limitations bar." *Id.*[4]

Analytically, cases construing limitations statutes waiving sovereign immunity are relevant here because they share many similarities with the criminal statute of limitations. For example, only Congress can waive sovereign immunity and vest the lower federal courts with jurisdiction to entertain suits against the sovereign. *See Dalm*, 494 U.S. at 608. Similarly, Congress has sole power to establish the parameters of the jurisdiction enjoyed by the lower federal courts, including jurisdiction in criminal cases. *See Palmore*, *supra*, 411 U.S. at 389. Additionally, just as congressional waivers of sovereign immunity must be strictly construed in favor of the sovereign, *Lane v. Pena,* 518 U.S. 187, 192, 116 S.Ct. 2092, 135 L.Ed.2d 486 (1996), criminal limitations statutes are to be liberally interpreted in favor of repose. *Toussie,* 397 U.S. at 115. Exceptions to limitations statutes in the sovereign immunity context are not to be implied and, when provided by law, must be narrowly construed. *See Block v. North Dakota ex rel. Board of Univ. and School Lands,* 461 U.S. 273, 287, 103 S.Ct 1811, 75 L.Ed.2d 840 (1983). The same follows for criminal limitations statutes. *Toussie*, 397 U.S. at 115 & 121. Finally, any ambiguity is resolved in favor of the party defending the time-barred claim. *Compare United States v. Williams*, 514 U.S. 527, 531, 115 S.Ct. 1611, 131 L.Ed.2d 608 (1995) (ambiguity must always be resolved in favor of Government in sovereign immunity arena), with *Toussie*, 397 U.S. at 122 (where choice

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[4] *Dalm* also involved a statute which granted jurisdiction in " spacious terms," 494 U.S. at 601, but a limitations period contained in a separate statute which "qualif[ied] a taxpayer's right to bring a refund suit upon compliance with certain conditions." *Id. Cf.*, 18 U.S.C. §§ 3231 and 3282 *et seq.*

has to be made in construing exceptions to criminal limitations statute, we have chosen to side with the defendant).

Another canon of statutory construction applies here. Congress has spoken with an unequivocal voice when it has sought to allow waiver of a statute of limitations and in characterizing a limitations period as an affirmative defense. For example, 26 U.S.C. § 6532 (a) (2) provides for the parties to extend by agreement the limitation period set forth in § 6532 (a) (1). Likewise, Rule 39, Tax Court Rules, characterizes as an affirmative defense a claim that the statute of limitations has expired. When Congress knows how to say something and choose no to do so, its silence is controlling. *BFP v. Resolution Trust Co.*, 511 U.S. 531, 537, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994).

Since there is no express provision of law to the contrary in the federal statutes, Najjar's crime was completed in 1999, could not be the subject of a prosecution, trial, or punishment based on an information instituted after that date. Not only does § 3282 bar the prosecution, but, more importantly, it extinguishes the power of a court to try or punish beyond the limitations period. Unlike the bar to prosecution (which arguably can be waived), the power of a court to try or punish goes directly to its jurisdiction.

Allowing the lower court decision to stand would effectively rewrite the statute to exclude its qualification of a court's jurisdiction—its power to try or punish—and permit the parties to usurp the congressional power to define and delimit the jurisdiction of inferior federal courts.

B. Rule 12

There is an additional reason why § 3282 should be construed as a jurisdictional bar not subject to waiver. Enacted in 1944, Fed.R.Crim.P. 12 abolished pleas to

jurisdiction, pleas in abatement, and other special pleas that the Advisory Committee noted had "baffled and mystified" many practitioners. Advisory Committee's Notes, Rules 12, U.S.C.A., Rules of Criminal Procedure, p. 9. The Advisory Committee's notes classified objections and defenses into two groups. In the first group are all objections and defenses "which must be raised by motion, failure to do so constituting a waiver." *Id.* In the other group are objections and defenses which "at the defendant's option may be raised by motion, failure to do so, however, not constituting a waiver [,]" and include such matters as former jeopardy, former conviction, former acquittal, *statute of Limitations,* immunity, lack of jurisdiction, failure of indictment or information to state an offense, etc." *Id.*, at p.10 (emphasis added). [5] Thus, the Advisory Committee notes leave no doubt that, unlike other defenses, statutes of limitations claims are not subject to waiver because they are properly treated as jurisdictional. *See Williamson v. United States,* 512, 594, 614-615, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994) (Kennedy, J., concurring in judgment) (citing cases in which advisory Committee's notes are taken as authoritative evidence of intent).

C. Necessity for Certiorari Review

The lower court's decision adjudicates an important federal question in a manner that conflicts with relevant decisions of this Court. *See* S.Ct.R. 10(c). Most notably, the Eleventh Circuit's holding that waiver, an exception not expressly or impliedly recognized by Congress, of the limitations period under § 3282 is permitted, is substantially in conflict with this

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[5] Najjar takes no position on whether waiver by agreement of the identified matters that do not bear on a court's jurisdiction is proper. *See Ricketts v. Adamson,* 483 U.S. 1, 10, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987) (double jeopardy defense waivable by pretrial agreement). The sole issue here is that § 3282 is jurisdictional and thus beyond the scope of litigants to confer.

Court's decision in *Toussie* strictly construing the statute and not recognizing any exceptions other than those " expressly provided by law. Moreover, characterizing § 3282 as a non-jurisdictional affirmative defense conflicts with this Court's precedent that Congress has the sole power to define and limit the jurisdiction of the lower federal courts, which the plain language of the statute has done.

Two prior decisions of the Court, while relevant, are not dispositive of whether § 3282 is a non-jurisdictional affirmative defense. *Biddinger v. Commissioner of Police,* 245 U.S. 128, 38 S.Ct. 41, 62 L.Ed. 193 (1917), involved an extradition by one state, Illinois, of an alleged criminal who had fled to another state, in which the Court stated:

> The statute of limitations is a defense and must be asserted on the trial by the defendant and *the form of the stature in Illinois* . . . . makes it especially necessary that the claimed defense of it should be heard and decided by the courts of that state.

Id. at 135 (emphasis added). *Biddinger*, therefore, involved assertion of a state statute of limitations during an extradition proceeding in which the defendant had fled the jurisdiction of the state of Illinois, all of which distinguish it from this case. While *Biddinger* is frequently cited by the circuits as precedent for the conclusion that § 3282 is waivable affirmative defense, nothing about that decision should characterize a significantly different federal statute of limitations.

In an early case dealing with the nature of a statute of limitations, *United States v. Cook*, 17 Wall. 168, 21 L.Ed.2d 538 (1872), the Court construed a federal statute of limitations and concluded that, "if the statute contains exceptions," the defendant had to raise the statute of limitations by special plea. *Id.* at 179. *Cook*, however, cannot be the polestar for the lower court's holding for a least three reasons. First, the parties did not raise and the Court made no

mention of the effect of the statute's expiration on a court's subject matter jurisdiction. Second, the statute in *Cook* did not contain the blunt limiting phase "except as otherwise expressly provided by law," which § 3282 contains. Third, the analysis in *Cook* is clouded by the archaic language which dominated any discussion of the old common law forms of pleading, which, as noted in section B, *supra,* had "baffled and mystified" practitioners. In this vein, the adoption of Rule 12 in 1944, in particular the Advisory Committee's note accompanying Rule 12, suggests the reliance on *Cook*, a case decided 130 years ago, would be misplaced.

There is conflict among the circuits on whether § 3282 is a jurisdictional bar or a waivable affirmative defense. *See* S.Ct.R.10(a). In *United States v. Crossley,* 224 F.3d 847 (6th Cir.2000), the Sixth Circuit, following its previous decision in *Benes v. United States,* 276 F.2d 99, 109 (6th Cir. 1960), held:

> "we must follow the law of the *Benes* decision and hold that, absent an explicit waiver, the statute of limitations presents *a bar to prosecution* that may be raised for the first time on appeal."

224 F.2d at 858 (emphasis added).

While *Crossley* narrowed the *Benes* decision by permitting an express waiver, it did not address the inherent conflict between finding the statute of limitations to be a jurisdictional bar and allowing waiver. There is also a conflict with Tenth Circuit's decision in *Waters v. United States*, 328 F.2d 739, 743 (10th Cir. 1964), where the court of appeal held:

> if recognition of a distinction between the statute of repose in civil cases and the substantive bar in criminal cases, is to have any meaning in the administration of criminal justice, the statute of limitations must be held to

> affect not only the remedy, but to operate as a jurisdictional limitation upon the power to prosecute and punish.

Id.

The decision of other courts of appeal, some of which are relied on by the Eleventh Circuit, reject the statute of limitations as jurisdictional bar. These decisions are distinguishable, however, either because they involved a limitation claim dependent on when overt acts in a conspiracy prosecution occurred,[6] *see Acevedo-Ramos v. United States*, 961 F.2d 305, 306 (1st Cir.1992); *United States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir. 1987); *United States v. Meeker*, 701 F.2d 685, 687 (7th Cir. 1983), *United States v. Walsh*, 700 F.2d 846, 855 (2nd Cir. 1983), a statute entirely different from § 3282, *see United States v. Karlin*, 785 F.2d 90, 91 (3rd Cir. 1986); *United States v. Akmakjian*, 647 F.2d 12, 14 (9th Cir. 1981), and an indictment for a capital offense, but conviction on a lesser-included offense). *United States v. Williams*, 684 F.2d 296, 289-299 (4th Cir. 1982).

It is true that every statute of limitations may permit a rogue to escape. *Toussie*, 397 U.S. at 123. It is equally true, however, that the very purpose of statutes of limitations is to bar a claim after a certain period of time has passed "without regard to whether the claim would otherwise be meritorious." *Dalm*, 494 U.S. at 609 n.7. *See also Beach v. Ocwen Federal*

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[6] Najjar argues for no broader a holding than the statute of limitations is a jurisdictional bar where the indictment or information shows on its face that the limitations period has expired. *Cf. United States v. Sepe*, 486 F.2d 1044, 1045 (5th Cir. 1973)(*en banc*) ("[t]he panel was careful to say that a guilty plea does not bar an appeal which asserts that the indictment of information...showed on its face that it was barred by the statute of limitations."). *See also United States v. Helmich*, 704 F.2d 547, 548 (11th Cir. 1983) ('[a] defendant who pleads guilty can challenge the prosecution as time-barred only insofar as the indictment on its face shows that the limitations period had expired.").

Bank, 523 U.S. 410, 416, 118 S.Ct. 1408, 140 L.Ed.2d 566 (1998) ("limitation statutes are aimed at lawsuits, not at the consideration of particular issues on lawsuits.") (internal quotations omitted). There are few "irrebutable" presumptions under the law. This Court has declared one of them to be expiration of the criminal statute of limitations. *Marion*, 404 U.S. at 322.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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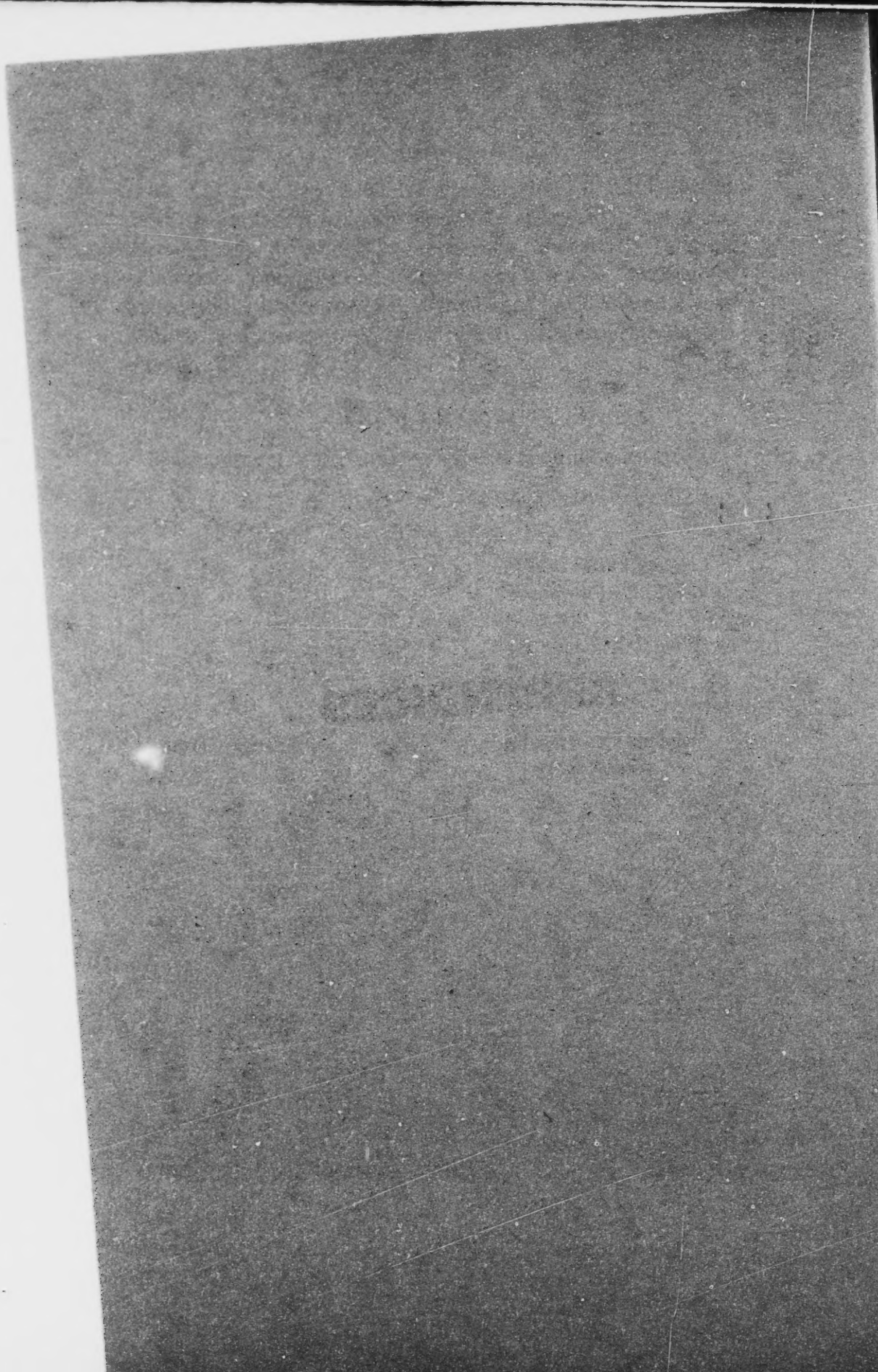
APPENDICES



APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVETNH CIRCUIT

[Filed March 01, 2002]

NO. 01-12489
Non-Argument Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

SAMIR S. NAJJAR,
Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

Per Curiam:

Samir S. Najjar appeals his conviction and 36-month sentence for making a false statement to a department of the United States in violation of 18 U.S.C. § 1001. On appeal, Najjar argues that the district court (1) erred by denying his motion to dismiss the indictment for lack of jurisdiction due to the expiration of the statute of limitations, and (2) abused its discretion by denying Najjar's motion to withdraw his guilty plea.

The district court's subject matter jurisdiction is a question of law and, is therefore, subject to *de novo* review. *See United States v. Oliver*, 148 F.3d 1274, 1275 (11th Cir. 1998). We review a district court's denial of a motion to withdraw a guilty plea for abuse of discretion. *See United States v.*

Medlock, 12 F.3d 185, 187 (11th Cir. 1994). We will reverse a district court's decision on a motion to withdraw only if it is arbitrary or unreasonable. *See United States v. Bushert*, 997 F.2d 1341, 1355 (11th Cir. 1993).

Upon thorough review of the record, as well as careful consideration of the parties' briefs, we find no reversible error and affirm.

The relevant facts may be briefly stated. On August 10, 2000, Najjar was charged by information with filing false and fraudulent claims to the United States Department of Defense in connection with the Civilian Health and Medical Program of the Uniformed Services. On the same day, Najjar executed a waiver of indictment and plea agreement, in which he pled guilty to the information.

Six months later, Najjar filed a motion to withdraw his guilty plea and a motion to dismiss the information for lack of jurisdiction based on the expiration of the statute of limitations. The district court conducted two evidentiary hearings on these motions and made the following factual findings:

> This Court finds that on August 10, 2000, the Defendant was alert and intelligent; that the questions and answers were not mechanical; that his answers to the Court's questions at the time were rational and coherent; and that the Defendant did freely, voluntarily, intentionally and knowingly enter a plea of guilty.
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> ....
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> Therefore, the Court finds that the Defendant entered his plea while he understood the proceedings with both a rational an a factual understanding of what was going on, while he had a rational and a factual understanding of the offense, and while he had the ability to assist counsel for months in advance to entering his plea as well as on that day of August 10th. . . .

> Evidence also showed that Defendant had the keen intellectual capacity to understand and manipulate the legal process to sufficiently delay resolution of this complex matter in an unusual manner, to the effect that the Statue of Limitations ran before he filed his Motion to withdraw his Guilty Plea. After months of meetings and negotiations with all attorneys involved, he entered into a Plea Agreement with respect to the resolution of his course of criminal conduct that spanned many years, which, by his own admission, amounted to approximately five million dollars ($5,000,000.00) in funds fraudulently obtained from private insurance companies and from the United States. . . .
>
> In addition to the evidence showing that the plea was made intelligently and knowingly, the evidence also showed that the plea was made freely and voluntarily. Defendant asserts now that his plea was not voluntarily or freely made because he suffered from conditions of sleep-apnea, sleep deprivation and severe depression, together with situational stressors of wife's pursuit of a divorce and his brother's threat of suicide if Defendant decided not to enter a guilty plea made the night before Defendant entered the plea. However, given the "totality of the circumstances surrounding the plea," and the evidence presented, the Court has formed the conclusion that Defendant lacks credibility in his assertions.

The district court then lists numerous instances that it was aware of in which Najjar had been dishonest, concluding the Najjar had "questionable credibility."

The district court found that, pursuant to *United States v. Buckles*, 843 F.2d 469, 472 (11th Cir. 1988), (1) Najjar had the close assistance of counsel throughout the plea negotiations; (2) Najjar's pleas was knowing and voluntary; (3) judicial resources would not be conserved by permitting the withdrawal of Najjar's plea, particularly in light of the List of

Victims in the court's file which included "hundreds and hundreds and hundreds of names," meaning that a trial would be extremely lengthily and complex; and (4) the government would be highly prejudiced if Najjar was permitted to withdraw his plea based on the passage of time since the plea agreement. The district court accordingly denied Najjar's motion to withdraw his plea and subsequently sentenced him to 36 months imprisonment. This appeal followed.

As a preliminary matter, we find no merit to Najjar's argument based on the statute of limitations. Najjar argues that in a criminal case, the statute of limitations is a jurisdictional bar that cannot be waived in a plea agreement. We disagree. Indeed, pursuant to binding precedent, the statute of limitations is a matter of defense that must be asserted at trial by the defendant. *See Capone v. Aderhold*, 65 F.2d 130, 131 (5th Cir. 1993).[1]

Although we have not more recently occasion to address this issue, every other circuit to have considered it has likewise concluded that the expiration of the statute of limitations does not divest a district court of subject matter jurisdiction, but rather constitutes an affirmative defense, which the defendant can waive. *See United States v. Spector*, 55F.3d 22, 24 (1st Cir. 1995) ("A statute of limitations defense is a waivable affirmative defense, not a jurisdictional bar to prosecution. Failure to raise the defense in a timely manner can result in its waiver." (citation omitted)); *United States v. Wilson*, 26 F.3d 142, 155 (D.C. Cir. 1994) ("[T]he settled law in our circuit has been that a criminal statute of limitations is not jurisdictional in nature and therefore can be waived."); *United States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir. 1987) ("It is well settled that the statute of

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[1] In *Bonner v. City of Prichard*, 661 F.2d 12.6, 12.9 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to the close of business of September 30, 1981

limitations is an affirmative defense which is waived unless raised at trial."); *United States v. Karlin*, 785 F.2d 90, 92-93 (3d Cir. 1986) ("[I]n criminal cases that statute of limitations does not go to the jurisdiction of the court but is an affirmative defense that will be considered waived if not raised in the district court before or at trial."); *United States v. Meeker*, 701 F.2d 685, 687 (7th Cir. 1983) (same); *United States v. Walsh*, 700 F.2d 846, 855 (2nd Cir. 1983); *United States v. Williams*, 684 F.2d 296, 299 (4th Cir. 1982) (same); *cf. United States v. Crossly*, 224 F.3d 847, 858 (6th Cir. 2000) (holding that the statute of limitations presents a bar to prosecution, but concluding that it may be waived by an explicit waiver). Indeed, *none* of the courts of appeals has taken the position urged by the defendants, and we decline to do so in this case.

We are likewise unpersuaded by Najjar's contention that the district court abused its discretion by denying his motion to withdraw his guilty plea. Pursuant to Fed. R. Crim. P. 32(e), a district court may permit a defendant to withdraw his plea before the district court imposes sentence for "any fair just reason." In determining whether a defendant has shown a fair just reason, the district court evaluates the totality of the circumstances, including "(1) whether close assistance of counsel was available; (2) whether the plea was knowing and voluntary; (3) whether judicial resources would be conserved; and (4) whether the government would be prejudiced if the defendant were allowed to withdraw his plea." *Buckles*, 843 F.2d at 472 (citiations and footnote omitted).

Here, the district court made factual findings on each of these factors. In doing so, the district court made credibility determinations prior to concluding that Najjar had not satisfied the prerequisites to Rule 32(e). Upon our review of

the record, we can find no abuse of the district court's sound discretion in its *Buckles* analysis and its conclusion that Najjar was not entitled to withdraw his plea.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA JACKSONVILLE DIVISION

[Filed FEB. 21, 2001]

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAMIR S. NAJJAR,

Defendant.

ORDER

As stated in open Court on February 20, 2001, the Defendant's Motion to Dismiss for Lack of Jurisdiction (Doc. No. 15, filed on February 5, 2001) based on Statute of Limitations is DENIED because it is a non-jurisdictional affirmative defense, which must have been raised by the Defendant. *United States v. Cardoen*, 882 F.Supp. 1045, 1049 (S.D. Fla. 1994). A plea of guilty without raising the defense is a waiver thereof. *Acevedo-Ramos v. United States*, 961 F. 2d 305, 308-09 (1st Cir. 1992); *accord Biddinger v. Commissioner of Police*, 245 U.S. 128, 135, 38 S.Ct. 41, 43, 62 L.Ed. 193 (1917).

DONE AND ORDERED at Jacksonville, Florida, this 21st day of February, 2001.

/s/ Harvey E. Schlesinger
HARVEY E. SCHLESINGER
United States District Judge